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No. 91-1721

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Petitioner,

vs.

CITY OF JACKSONVILLE, FLORIDA, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

BRIEF OF EQUAL RIGHTS ADVOCATES, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, AND THE EMPLOYMENT LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Interest of *Amici*

Amici, the Employment Law Center of the Legal Aid Society of San Francisco, Equal Rights Advocates, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, and the Mexican American Legal Defense and Educational Fund ("MALDEF") are public interest law firms founded to secure and protect the civil and constitutional rights of minorities, women and low income persons. *Amici* believe that business opportunities for minority and women owned businesses are essential to the eco-

nomic development of our communities and that these opportunities should be promoted through the development by state and local governments of constitutionally valid minority and women owned business programs.

Amici are counsel for the Coalition for Economic Equity, a coalition of minority and women owned business associations and companies in San Francisco. *Amici* represented the Coalition as defendant intervenors in the cases brought by the Associated General Contractors of California challenging San Francisco's minority business enterprise program. *Associated General Contractors Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) and *Associated General Contractors, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991). In addition, these *amici* served as counsel for the Coalition as *amicus* before this Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

Amici have also submitted *amicus* briefs to this Court in challenges to minority business enterprise programs and other cases involving race and gender conscious relief, including *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987); and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

The Employment Law Center, the principal project of the Legal Aid Society of San Francisco, is nationally recognized for its expertise concerning issues surrounding employment. It has been a pioneer in the employment law field for over a decade. It focuses on the legal problems of disadvantaged people as they seek to secure, retain, and provide employment opportunities, and it represents those who find these opportunities denied them for reasons other than their ability to do the job.

For eighteen years, Equal Rights Advocates has been dedicated to working to secure the rights of women through the legal system. Representing the interests of women in lawsuits which have a significant impact on large numbers of women, combined with its public education program, the organization is recognized as having the expertise to advocate effectively for the rights of women who would otherwise not be represented.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area is the northern California affiliate of the Lawyers' Committee for Civil Rights Under Law. For the past twenty-five years, the Lawyers' Committee has been working to eliminate the effects of employment discrimination in the northern California area through litigation, legislation, and advocacy.

The Mexican American Legal Defense and Educational Fund, Inc. ("MALDEF") is a national non-profit civil rights organization established in 1967. Its principal objective is to secure the civil rights of Hispanics living in the United States through litigation and education.

In the three years since *Croson* was decided, *amici* have provided legal guidance to several state and local governments and minority and women owned business associations across the country regarding the adoption of constitutional minority and women owned business programs. Because of their support for constitutionally valid programs, *amici* are opposed to Petitioner's effort to dismantle the minority business enterprise participation program in Jacksonville. But *amici* have an interest in ensuring that all businesses which are denied an opportunity to compete be entitled to their day in court, including the minority and women owned business enterprises represented by *amici*. As organizations concerned with securing full equality in employment and contracting opportunities, *amici* have a strong interest in this case, and therefore respectfully submit this brief.

The written consents of the parties to the submission of this brief have been lodged with the Clerk pursuant to Rule 37.2.

Summary of Argument

A fair reading of the Complaint filed below reveals that a group of white contractors in the City of Jacksonville were overtly discriminated against on the basis of their race, and the Court of Appeals ruled that they had no standing to sue.

This remarkable result follows because the white contractors of the AGC did not point to a "specific" city contract they would have secured but for the minority business enterprise participation

program. But the white contractors did not sue for money lost as a result of losing any specific contracts; they sued for declaratory relief, to enjoin the operation of the ordinance and thus secure the opportunity to compete on an equal footing with minorities for all contracts let by the City.

Under the Eleventh Circuit's opinion, one may not challenge the denial of the opportunity to compete on an equal footing. In the Eleventh Circuit, governmental obstacles created on the basis of race or gender seemingly are immune, as long as they do not literally take away a benefit such as a municipal contract, but only bar one from applying for it.

The judgement below should be reversed because it is inconsistent with standing law developed by this Court which expressly recognizes that one may sue for the denial of an equal opportunity to compete for a benefit. The Eleventh Circuit's rule is wrong because it equates the requirement of "specific injury" in classic standing caselaw with a specifically identified economic injury. But that is not what "specific" means in the standing context. "Specific" injury includes a specific *handicap* illegitimately imposed; AGC alleged that specific, personal injury.

This Court's recent opinions emphasizing the constitutional separation of powers rationale behind standing requirements support reversal of the judgment below.

Argument

I

ARTICLE III STANDING IS DEMONSTRATED BY THE PARTICULARIZED INJURY CLAIMED BY PETITIONER

Only one of the three classic elements of standing is before this Court. The court below addressed only the "injury in fact" requirement, holding that AGC had failed to show a specific injury to itself.[1] *Northeastern Florida Chapter of Associated*

[1]The Court of Appeals properly assumed that the association, the AGC, would have standing if any member did. *Hunt v. Washington*

General Contractors v. Jacksonville, 951 F.2d 1217, 1219-20 (11th Cir.), *cert. granted*, 61 U.S.L.W. 3256 (1992). Not at issue here are the two other elements, relating to the causal connection between the injury and the conduct complained of, and whether it is likely that a favorable decision would redress the injury. *See generally*, *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).

The requirement of a specific injury is a function of the nature of judicial review: The Constitution's Article III cases or controversies requirement ensures, among other things, that courts will not interfere with other branches of government unless an individual asserts that he has been directly wronged. The point is to test whether "the plaintiff's alleged injury [is] a particularized one, which sets him apart from the citizenry at large." Antonin Scalia, "The Doctrine of Standing As An Essential Element of the Separation of Powers," 17 *Suffolk U. L. Rev.* 881, 881-82 (1983).

The constitutional contrast is between (i) a specific injury that sets a plaintiff apart from the general population, and (ii) an abstract injury to general rights suffered, if at all, by every citizen. *Lujan*, 112 S.Ct. at 2143. The term "specific" in this context is defined in juxtaposition with the "general" vindication of the public interest, *id.* at 2145; the same contrast is meant by the juxtaposition of "abstract" harm and the "concrete injury" alleged by a plaintiff with standing. *Id.* at 2146 (Kennedy, J., with Souter, J., concurring). The "specific" injury test is no more and no less than the requirement that plaintiffs have a "personal stake in the outcome" as opposed to a stake shared with the rest of the population. *Baker v. Carr*, 369 U.S. 186, 204 (1962), *quoted at Lujan*, 112 S.Ct. at 2148 (Stevens, J., concurring in the judgement). *See Asarco v. Kadish*, 490 U.S. 605, 635-636 (1989) (Rehnquist, C.J., concurring and dissenting) (no Article III standing for "generalized grievance" about governmental action).

But the test used by the Court of Appeals was not designed to, and does not, distinguish between would-be plaintiffs in this way.

State Apple Advertising Commission, 432 U.S. 333, 343 (1977). The standing issue in this case devolves to the standing of the AGC's white contractors barred from bidding on certain municipal contracts.

It bears no relation to the Article III interests discussed by this Court. The "specific contract" test of the Eleventh Circuit does not eliminate the plaintiff that pleaded "merely that he suffers in some indefinite way in common with people generally." *Massachusetts v. Mellon (Frothingham)*, 262 U.S. 447, 488 (1923). Crucially, the AGC pleaded injury, specific to it and its members, and *not* shared generally with any other group nor the population at large. Plaintiff is not composed of whites generally, or even white business owners generally; rather, the AGC includes contractors who "regularly bid on and perform construction work for the City of Jacksonville . . . [who would have been] eligible to, and would have bid on [the set aside contracts] but for the restrictions imposed on such contracts by the Defendants." Complaint ¶¶ 9, 46. These members of the AGC specifically alleged that they had been precluded from bidding on those set aside contracts. *Id.* ¶ 49.

These members of the AGC do not seek to vindicate a generalized right, nor the various rights of the general public. They make no generalized grievance. Unlike the rest of the population, the AGC members were eligible to bid on the set aside contracts themselves, and would have done so; but for the assertedly illegal action of the City. This is specific enough for Article III.

Minority set aside programs — like racial or gender based discrimination in general — are not the sort of executive or legislative action that this Court insulates from judicial review. *See e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (announcing guidelines for race conscious business set aside programs).[2] In the context of Article III's enforcement of

[2] Nor are related principles of federalism implicated by federal judicial review. This Court expressly made that point in disposing of one of appellants' arguments in the *Croson* case: "The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have *the federal courts enforce those limitations*." *Croson*, 488 U.S. at 490 (emphasis supplied).

the separation of powers, it is important to note that judicial review here will not interfere in areas reserved to administrative or legislative discretion. *Compare Lujan v. National Wildlife Federation*, 110 S.Ct. 3177, 3191 (1990). There is nothing inappropriate in resolving, through the courts, the validity of the race conscious system of public contracting described in the complaint filed below.

II

THESE ALLEGED VICTIMS OF UNEQUAL TREATMENT HAVE STANDING TO CHALLENGE THAT TREATMENT

Below, the AGC alerted the Court of Appeals to the line of cases including *Village of Arlington Heights Development Corp. v. Metropolitan Housing Corp.*, 429 U.S. 252, 261-62 (1977); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Orr v. Orr*, 440 U.S. 268, 273 (1979), through to *Heckler v. Mathews*, 465 U.S. 728, 739 (1984), all of which noted that "discrimination *itself*," the imposition of unequal treatment alone, is an injury upon which the victim can sue. *Heckler*, 465 U.S. at 739 (emphasis supplied).

Under the teachings of this Court, no one is more directly affected, has more at stake, or is most accurately termed "an object of the action (or foregone action) at issue," *Lujan*, 112 S.Ct. at 2137, than the person who is treated differently by reason of his race or ethnicity. It is not possible to read the opinions in this Court's chief case in the substantive area of discrimination law without understanding that the victims of racially unequal treatment, as such, have suffered injury to their "*personal* rights." *Croson*, 488 U.S. at 492-493 (O'Connor, Rehnquist, White & Kennedy, JJ.) (emphasis supplied). Justice Stevens expressed his opinion that in public contracting, race ought generally to have no relevance to one's "*access* to the market," 488 U.S. at 512 (Stevens, J., concurring), and Justice Scalia quoted Justice

Douglas' *DeFunis* dissent: "Whatever his race, he had a constitutional right to have his application *considered* on its individual merits in a racially neutral manner." 488 U.S. at 527 (Scalia, J., concurring) (emphasis supplied), *quoting DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting).

The inability to compete, obstacles in securing access to markets, and double standards have always been treated by the Court as real, specific injuries, and persons on whom those inequalities are imposed have been granted standing. Neither the existence of the alleged injury, nor the specific identity of the victim, is eviscerated when the scheme under attack makes it difficult or impossible to specify an ultimate benefit lost. This has been true in the race discrimination context, such as in *Bakke* and *International Bro. of Teamsters v. United States*, 431 U.S. 324 (1977) (Title VII litigation):

> When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

431 U.S. at 365-366. This has been true in other areas of the law as well.[3] These cases all recognize that valid particularized complaints may be presented by those who, regardless of whether they

[3] Courts routinely grant standing to those who allege unequal opportunity to compete. *See e.g., CC Distributors, Inc. v. United States*, 883 F.2d 146, 149-150 (D.C. Cir. 1989) (loss of opportunity to compete for Air Force engineering supply contracts); *Glacier Park Foundation v. Watt*, 663 F.2d 882, 885 (9th Cir. 1981) (loss of opportunity to compete for national park concessions contract); *Contractors Ass'n. of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 945 F.2d 1260, 1264 (3rd Cir. 1991) (contractors' loss of opportunity to compete for city construction contracts); *Orange Park Florida T.V., Inc. v. F.C.C.*, 811 F.2d 664, 672 (D.C. Cir. 1987) (television station operator had standing to use for loss of opportunity to reapply for FCC license, despite not actually having reapplied). *See also, National Ass'n. of Neighborhood Health Centers, Inc. v. Mathews*, 551 F.2d 321 (D.C. Cir. 1976) (standing for health care provider which had been told it could not apply for funding).

would or would not assuredly secure an ultimate benefit, cry foul at the process which awards the benefit to another.

Despite the import of opinions such as *Bakke, Village of Arlington Heights* and *Orr*, all of which were cited to the court below, the Court of Appeals never mentioned them. Instead of following this Court's guidance, the Court of Appeals looked to its own precedent, *Cone Corp. v. Florida Dept. of Transportation*, 921 F.2d 1190 (11th Cir.), *cert. denied*, 111 S.Ct. 2238 (1991). But *Cone* too elides the teachings of this Court: *Cone* never considered the proposition that an unfair handicap, or having one's "access" to bids barred, might itself be an "injury." And beyond *Cone*, nothing else supports the ruling below.

Conclusion

The test for standing imposed by the Court of Appeals abides outside traditional standing law, adrift from the rationale of Article III, and discredited by the precedent of this Court. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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